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No. 94-5769

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1995

**TOMMY L. KUTLEDGE,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR PETITIONER**

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## QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars the entry of judgments of conviction and the imposition of concurrent sentences on two separate counts in an indictment where the conduct that forms the basis of the count alleging a conspiracy to distribute a controlled substance (21 U.S.C. § 846) is identical to the conduct that establishes the "in concert" element in the count alleging a continuing criminal enterprise (21 U.S.C. § 848).

THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON ONE AND CONSPIRACY VERDICTS IN CASES INVOLVING A SINGLE COURSE OF CONDUCT VIOLATES THE FIFTH AMENDMENT.

A. Congress Did Not Intend To Impose Cumulative Punishment For A Single Course Of Conduct Under (And 21 U.S.C. § 848 (Continuing Criminal Enterprise) And 21 U.S.C. § 846 (Conspiracy)).

# LIST OF PARTIES

Petitioner Tommy L. Rutledge was the only appellant in Case No. 93-1122 in the United States Court of Appeals for the Seventh Circuit. His case was consolidated on appeal with Case No. 93-2652, in which Shelly Henson was the only appellant, and Case No. 93-2653, in which Richard Hagemaster was the only appellant. Petitioner's appeal also was consolidated initially with Case No. 93-2654, in which Stan Winters was the only appellant, but that case subsequently was severed from the consolidated appeals. The United States of America was the only appellee in all of these appeals.

In the United States District Court for the Central District of Illinois, petitioner was named as a co-defendant in a second superseding indictment with Shelly Henson, Richard Hagemaster, Stan Winters, and Donald Taylor in Criminal Case No. 91-40009. In a prior indictment in the same case, petitioner had been named as a co-defendant with Roger Malott. The United States of America was the only plaintiff in that case.

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UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

OPTIONAL FORM NO. 10

The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the denial of the petition for rehearing and suggestion for rehearing en banc are reversed as *United States v. Rutledge*, 40 F.3d 779 (7th Cir. 1994) (U.S.A. 25-47). The judgment of the United States District Court for the Central District of Illinois is affirmed. (U.S.A. 824)

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued judgment on November 10, 1994. (U.S.A. 25-47)

In this brief, petitioner will refer to respondent as "U.S.A." and to the record of the proceedings as "R."

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**TOMMY L. RUTLEDGE,**  
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**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The judgment of the United States Court of Appeals for the Seventh Circuit, its opinion, and its denial of the petition for rehearing and suggestion for rehearing *en banc* are reported as *United States v. Rutledge*, 40 F.3d 879 (7th Cir. 1994). (J.A. 25-47, 48.<sup>1/</sup>) The judgment of the United States District Court for the Central District of Illinois is unreported. (J.A. 8-24.)

**JURISDICTION**

The United States Court of Appeals for the Seventh Circuit entered judgment on November 10, 1994. (J.A. 25, 47.)

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<sup>1/</sup> In this brief, petitioner will refer to materials in the Joint Appendix as "J.A. \_\_\_\_", and to the record of the district court proceedings as "R. \_\_\_\_."

Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 3, 1995. (J.A. 48.) Petitioner's motion for leave to proceed *in forma pauperis* and petition for a writ of certiorari were filed on April 3, 1995. The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari were granted on June 26, 1995. (J.A. 49.) Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

### RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, which are set forth in the Appendix to this brief:

- U.S. Constitution amend. V;
- 21 U.S.C. § 841(a) and (b)(1)(A) (Prohibited acts);
- 21 U.S.C. § 846 (Attempt and conspiracy); and
- 21 U.S.C. § 848 (Continuing criminal enterprise).

### STATEMENT OF THE CASE

Petitioner Tommy L. Rutledge ("Rutledge") was named as a defendant in a second superseding indictment (the "indictment") filed on December 4, 1991, in the United States District Court for the Central District of Illinois. (J.A. 2-7.) Count 1 of the indictment alleged that Rutledge "knowingly and intentionally did engage in a continuing criminal enterprise, namely a series of violations of Title 21, United States Code, Sections 841(a)(1) and 846" and that such conduct was "[i]n violation of Title 21, United States Code, Section 848." (J.A. 2-3.) Count 2 of the indictment alleged that Rutledge, along with his co-defendants, had conspired

to possess cocaine with intent to distribute "in violation of Title 21, United States Code, Section 846." (J.A. 3-5.)<sup>27</sup>

On June 25, 1992, following a nine-day trial, the jury returned a verdict of guilty against Rutledge on both the continuing criminal enterprise ("CCE") count and the conspiracy count, as well as all other counts of the indictment. (R. 153.) On December 29, 1992, the district court entered judgments of conviction on all counts of the indictment. The district court sentenced Rutledge to serve a prison term of life on the conviction under Count 1 of the indictment (CCE, 21 U.S.C. § 848), and a prison term of life on Count 2 of the indictment (conspiracy, 21 U.S.C. § 846). (J.A. 10.) The judgment of the district court specified that the separate life sentences under Count 1 and Count 2 of the indictment would run concurrently. (*Id.*) Pursuant to 18 U.S.C. § 3013, the district court ordered Rutledge to pay a special assessment of \$300, consisting of a separate \$50 assessment for each judgment of conviction. (J.A. 9.)

On appeal, Rutledge argued that the district court violated the Double Jeopardy Clause of the Fifth Amendment both when the court entered separate judgments of conviction on the CCE charged in Count 1 and the conspiracy charged in Count 2, and when it imposed separate, concurrent sentences on those counts. *United States v. Rutledge*, 40 F.3d 879, 886 (7th Cir. 1994). (J.A. 37.)<sup>28</sup> The United States Court of Appeals for the Seventh Circuit agreed that "the conspiracy charge is a lesser included offense of the CCE

<sup>27</sup> The indictment also charged Rutledge with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (Count 3), possession of a firearm after conviction of a felony in violation of 18 U.S.C. § 922(g) (Count 4), and carrying and using a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c) (Counts 5 and 6). (J.A. 5-7.) No questions are presented with respect to those counts in this Court.

<sup>28</sup> Rutledge raised other claims of error with respect to both his trial and his sentencing. (J.A. 30-37.) Those claims are not pursued in this Court.

charge," but rejected Rutledge's Double Jeopardy Clause argument. 40 F.3d at 886. (J.A. 38.) Instead, the court of appeals adhered to the position it has taken since 1986 that "[c]oncurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE Act." 40 F.3d at 886, citing *United States v. Bafia*, 949 F.2d 1465, 1473 (7th Cir. 1991), cert. denied, 112 S. Ct. 1989 (1992), and *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988). (J.A. 38.) The court of appeals affirmed Rutledge's convictions and sentences in their entirety. 40 F.3d at 890. (J.A. 47.)

On December 6, 1994, Rutledge filed a timely pro se petition for rehearing and suggestion for rehearing *en banc* pursuant to an extension of time granted by the Seventh Circuit. In that petition he directed the Seventh Circuit's attention to *Mohr v. United States*, 113 S. Ct. 1378 (1993).<sup>47</sup> In *Mohr*, this Court vacated the Sixth Circuit's affirmance of the petitioner's judgment of conviction and concurrent sentences for both CCE and conspiracy counts, and remanded to the Sixth Circuit "for further consideration in light of the position presently asserted by the Acting Solicitor General." *Id.* at 1378. The Acting Solicitor General had argued that Congress did not intend to permit cumulative punishment for both CCE and conspiracy counts in cases where the evidence supporting the conspiracy conviction is the same as the evidence establishing the "in concert" element of the CCE violation. Brief for United States at 14, *Mohr v. United States*, 113 S. Ct. 1378 (1993). The court of appeals denied Rutledge's petition for rehearing and suggestion for rehearing *en banc* without explanation on January 3, 1995. (J.A. 48.)

<sup>47</sup> Rutledge had previously raised *Mohr* in a pro se letter to the Seventh Circuit, filed pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, on October 6, 1994, five weeks before the court of appeals issued its judgment and opinion affirming the district court.

Rutledge filed his petition for a writ of certiorari on April 3, 1995, requesting that this Court require the Seventh Circuit to conform its approach to multiple guilty verdicts under 21 U.S.C. §§ 846 and 848 to the requirements of the Double Jeopardy Clause, and to the practice adopted by a significant majority of the other circuits. The petition for a writ of certiorari was granted on June 26, 1995. (J.A. 49.)

### SUMMARY OF ARGUMENT

Application of three of this Court's cases requires that the court below be reversed and one of Rutledge's convictions and sentences be vacated: *Jeffers v. United States*, 432 U.S. 137 (1977); *Garrett v. United States*, 471 U.S. 773 (1985); and *Ball v. United States*, 470 U.S. 856 (1985).

There is no dispute in this case that Rutledge's conspiracy conviction rests on the very same conduct that the Government used to prove the "in concert" element of the CCE offense. Nevertheless, since 1986, the Seventh Circuit has endorsed the entry of separate judgments of conviction and imposition of concurrent sentences when a jury returns guilty verdicts on CCE and conspiracy counts. It is the only circuit to do so; nine others prohibit the entry of judgment and imposition of sentence on both, while two permit judgment but prohibit even concurrent sentences. Hence, the Seventh Circuit alone holds the Double Jeopardy Clause satisfied so long as the total length of the concurrent sentences imposed on the CCE and conspiracy judgments does not exceed the maximum authorized under one of the offenses of conviction.

This approach by the Seventh Circuit to multiple guilty verdicts in the context of combined CCE and conspiracy prosecutions contradicts this Court's Double Jeopardy Clause ruling in *Jeffers v. United States*, 432 U.S. 137 (1977), which this Court reaffirmed in *Garrett v. United States*, 471 U.S. 773 (1985). In *Jeffers*, this Court concluded that Congress did not intend to provide for cumulative punishment under the conspiracy and CCE statutes in

cases in which the same facts form the basis for both the conspiracy count and the concerted action element of the CCE charge. And in *Garrett*, this Court explicitly approved the rationale and holding of *Jeffers*. Congress, although it has otherwise amended both the conspiracy and CCE statutes since this Court decided *Garrett*, has left standing this Court's conclusion that Congress did not intend the two statutes to provide cumulative punishment based on the same underlying conduct.

The Double Jeopardy Clause bars imposition of multiple punishments not authorized by the legislature, either in a single proceeding or in successive proceedings. Because Congress did not intend courts to impose cumulative punishment for CCE and conspiracy convictions based upon the same course of conduct, the Constitution forbids courts from entering judgments of conviction on both guilty verdicts. *A fortiori*, the imposition of concurrent sentences is impermissible. In *Ball v. United States*, 470 U.S. 856 (1985), this Court held that the entry of a judgment of conviction is punishment in and of itself. Accordingly, the *Ball* Court concluded that when Congress did not express an intent to impose cumulative punishment, the Double Jeopardy Clause proscribes the entry of dual judgments of conviction, and consequently the imposition of concurrent sentences for a single course of conduct that violates more than one federal criminal statute.

Therefore, when the jury returned verdicts of guilty against Rutledge on both the CCE and the conspiracy counts, the district court should have entered judgment and imposed a sentence on only one of those verdicts. That is the only approach consistent with this Court's decisions in *Jeffers*, *Garrett*, and *Ball*. That approach also furthers the purpose of the Double Jeopardy Clause by mitigating the dangers of prosecutorial overreaching inherent in the distinctly modern practice of routinely bringing multiple-count indictments based on a single course of conduct — a practice that is itself a byproduct of the relatively recent explosive proliferation of criminal statutes.

Unless Congress clearly expresses its intent to permit cumulative punishment for a single course of conduct, the Double Jeopardy Clause prohibits both the entry of multiple judgments of conviction and the imposition of multiple sentences under different statutes. The *per se* rule that this Court adopted in *Ball* with respect to the Double Jeopardy Clause also vindicates fundamental principles of separation of powers and the criminal defendant's due process interest in not being subject to a greater sanction than that contemplated by the legislature. The Seventh Circuit's judgment affirming the district court's multiple judgments and concurrent sentences accordingly should be reversed, and the case should be remanded for the limited purpose of vacating one of the two judgments and its corresponding sentence.

#### ARGUMENT

#### THE SEVENTH CIRCUIT'S PRACTICE OF ALLOWING ENTRY OF JUDGMENTS OF CONVICTION AND CONCURRENT SENTENCES ON CCE AND CONSPIRACY VERDICTS IN CASES INVOLVING A SINGLE COURSE OF CONDUCT VIOLATES THE FIFTH AMENDMENT.

This Court has long recognized that the Double Jeopardy Clause protects the criminal defendant against both multiple prosecutions and multiple punishments. *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.1 (1994), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Just last term, the Court reaffirmed that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Witte v. United States*, 115 S. Ct. 2199, 2204 (1995), quoting *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874). That protection against multiple punishments has "deep roots in our history and jurisprudence." *United States v. Halper*, 490 U.S. 435, 440 (1989).

In recent years, the Court has emphasized that the Double Jeopardy Clause's prohibition against multiple punishments

specifically prohibits a court from imposing multiple or cumulative punishment for particular conduct when such punishment is not intended by the legislature. See *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty"); *id.* at 697 (Blackmun, J., concurring in the judgment) (only function of Double Jeopardy Clause in multiple punishments context "is to prevent . . . the sentencing court from imposing greater punishments than the Legislative Branch intended"); *id.* at 701 (Rehnquist, J., dissenting) (in imposing multiple punishments in single proceeding, dispositive question is "whether Congress intended to authorize separate punishments for the two crimes"). The Double Jeopardy Clause does not proscribe judicial enforcement in a single proceeding of a legislature's intentional enactment of multiple punishments for separately enumerated offenses. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983); see also *Whalen*, 445 U.S. at 688. When Congress does not authorize cumulative punishment, however, entry of multiple judgments of conviction and the imposition of multiple concurrent sentences are constitutionally forbidden. *Ball v. United States*, 470 U.S. 856, 864-65 (1985). Thus, the Double Jeopardy Clause bars multiple punishments in two specific circumstances: (1) when multiple punishments are imposed for the same conduct in successive proceedings, regardless of legislative intent; and (2) when the legislature did not intend to impose multiple punishments for the same conduct, regardless of whether those punishments are imposed in single or multiple proceedings.

The present case falls within the second of these categories. Congress did not authorize the multiple punishments imposed on Rutledge. This Court already has determined that Congress did not intend cumulative punishment for violations of the two statutes at issue here, 21 U.S.C. §§ 846 and 848, where, as in this case, the proof of the "in concert" element of the CCE offense is essentially

identical to the proof of the conspiracy. *Jeffers v. United States*, 432 U.S. 137, 155-57 (1977); accord *Garrett v. United States*, 471 U.S. 773, 794 (1985). Therefore, the district court imposed constitutionally proscribed multiple punishments, even though it entered the judgments and imposed the sentences in a single proceeding.

**A. Congress Did Not Intend To Impose Cumulative Punishment For A Single Course Of Conduct Under Both 21 U.S.C. § 848 (Continuing Criminal Enterprise) And 21 U.S.C. § 846 (Conspiracy).**

In this case, as in all Fifth Amendment challenges to multiple punishments, the threshold question is whether the legislature intended to impose cumulative punishment for a single course of conduct that violates more than one criminal statute. *Garrett v. United States*, 471 U.S. 773, 778 (1985). If Congress has not authorized cumulative punishment for violation of the conspiracy statute (21 U.S.C. § 846) and CCE statute (21 U.S.C. § 848), then the Double Jeopardy Clause bars such punishment. See *Whalen v. United States*, 445 U.S. 684, 688-89 (1980); see also *id.* at 701 (Rehnquist, J., dissenting). A court imposing multiple punishments not authorized by Congress violates both the specific guarantee against double jeopardy and the constitutional principle of separation of powers. *Id.* at 689 (footnote omitted).

This Court has already answered that threshold question with respect to 21 U.S.C. §§ 846 and 848. In *Jeffers v. United States*, 432 U.S. 137, 155-56 (1977), Justice Blackmun, writing for a four-Justice plurality, concluded that Congress did not intend "to allow cumulative punishment for violations of §§ 846 and 848." Upon careful analysis, the plurality concluded that both statutes are directed at the incremental harm associated with concerted activity in the area of narcotics trafficking. 432 U.S. at 157. The concurring opinion of Justice Stevens, joined by the remaining three justices who heard the case, agreed with the plurality that cumulative punishment may not be imposed for violations of §§ 846 and

848. *Id.* at 160. Thus the Court concluded, unanimously, that Congress did not intend to authorize cumulative punishment for conduct that violates both the conspiracy and CCE statutes, and that the Double Jeopardy Clause therefore bars such cumulative punishment.

This Court reaffirmed the *Jeffers* analysis of Congress's intent in *Garrett v. United States*, 471 U.S. 773 (1985). There, this Court expressly approved the plurality opinion in *Jeffers* holding that the Double Jeopardy Clause prohibits imposing cumulative penalties for guilty verdicts on CCE and conspiracy counts. *Garrett*, 471 U.S. at 794 (the *Jeffers* plurality "reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties"). The Court ultimately held that Congress did envision cumulative sentences for conduct that violates both the CCE statute and a substantive drug statute such as 21 U.S.C. § 841(a)(1). *Id.*

The Seventh Circuit apparently misreads *Garrett* as altering the principle articulated in *Jeffers* — rather than reaffirming its holding in the conspiracy context. See *United States v. Bafia*, 949 F.2d 1465, 1472 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1989 (1992) (stating that Supreme Court authorized multiple punishments under 21 U.S.C. §§ 846 and 848 when it "affirmed *Garrett's* sentence which included concurrent sentences for CCE and conspiracy convictions"). *Bafia* is incorrect in this regard. While the defendant in *Garrett* also had been convicted of conspiracy under 21 U.S.C. § 846, 471 U.S. at 776, the petitioner in *Garrett* did not challenge that conviction in this Court. See 52 U.S.L.W. 3912 (June 19, 1984) (questions presented in petition for certiorari in No. 83-1842). Therefore, this Court's opinion dealt exclusively with the interaction of CCE and substantive offenses. Where this Court does not address a particular issue in its opinion, the opinion's silence on that issue may not be taken as approval of the action of the court below with respect to that point. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (refusing to consider as

precedent for jurisdiction other opinions in which Court took jurisdiction without discussion); see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976) (summary affirmance not a *stare decisis* barrier to Court now considering the merits).

The basis for the finding in *Jeffers* that Congress did not intend cumulative punishment for CCE and conspiracy violations was that both statutes are aimed at the same "additional dangers posed by concerted activity." *Jeffers*, 432 U.S. at 157. There is, however, no such duplication between the purposes of substantive drug offenses and the proscription of continuing criminal enterprises found in 21 U.S.C. § 848, the CCE statute. As *Garrett* itself makes clear, the distinction between conspiracy and substantive offenses is dispositive in this context. See 471 U.S. at 794.

The Court's interpretation of congressional intent in *Jeffers* and *Garrett* was subsequently confirmed when Congress amended both 21 U.S.C. § 846 and 21 U.S.C. § 848 in the years following *Garrett* but did not enact any amendment to change this Court's ruling that a court cannot impose cumulative punishment under both statutes for a single course of conduct. See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, § 6470(a), 102 Stat. 4377 (1988) (amending 21 U.S.C. § 846); *id.*, Title VI, § 6481, Title VII, 7001, 102 Stat. 4382, 4387-88 (1988) (amending 21 U.S.C. § 848); Violent Crime Control Act of 1994, Pub. L. No. 103-322, Title XXXIII, §§ 330003(e), 330009(d), 330014, 108 Stat. 2141, 2143, 2146 (1994) (amending 21 U.S.C. § 848). Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pors*, 434 U.S. 575, 580 (1978); see also *Keene Corp. v. United States*, 113 S. Ct. 2035, 2043 (1993) (same). Where, as here, Congress revisits those statutes several times without disturbing this Court's specific, reiterated, and authoritative interpretation of their punitive effect, the presumption in favor of the prior judicial interpretation is all the stronger.

*Garrett's* analysis of the interaction between CCE and substantive offenses did not affect the Court's conclusion in *Jeffers* that Congress did not intend to impose a cumulative penalty on a defendant convicted of CCE and conspiracy violations in cases involving a single course of conduct. It is, and should remain, the view of this Court that the Double Jeopardy Clause forbids the imposition of cumulative punishment for CCE and conspiracy violations based on the same concerted activity.

**B. The Seventh Circuit's Practice Of Allowing Entry Of Judgments of Conviction And Imposition of Concurrent Sentences Upon Guilty Verdicts For Both CCE And Conspiracy Counts Involving Identical Conduct Impermissibly Sanctions Cumulative Punishment Proscribed By The Fifth Amendment.**

Given this Court's holding that Congress did not intend to impose cumulative punishment for a single course of conduct under the CCE and conspiracy statutes, the Double Jeopardy Clause bars not only the imposition of concurrent sentences on both counts, but also the entry of judgments of conviction on both verdicts. That conclusion follows from this Court's decision in *Ball v. United States*, 470 U.S. 856 (1985). In *Ball*, this Court held that Congress did not intend to allow cumulative punishment for the same conduct that resulted in separate violations of statutes prohibiting receiving a firearm (18 U.S.C. § 922(h)(1)) and possessing the same firearm (18 U.S.C. § 1202(a)(1)). *Id.* at 865. The Court stressed that punishment prohibited by the Double Jeopardy Clause, see *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), includes "a criminal conviction and not simply the imposition of sentence." *Ball*, 470 U.S. at 861. Moreover, this Court held in *Ball* that "[t]he second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence." *Id.* at 864-65. Accordingly, this Court held without dissent that "the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Id.* at 865 (emphasis supplied).

Under *Ball*, the Double Jeopardy Clause forbids even the entry of a second judgment of conviction in cases where the legislature did not intend cumulative punishment, regardless of whether that second judgment has any tangible effect on the defendant. Because *Ball* held that the unauthorized additional judgment by itself violates the Double Jeopardy Clause, the unconstitutionality of that judgment does not turn upon the existence *vel non* of foreseeable or unforeseeable collateral consequences. The Court in *Ball* did identify potential consequences that might possibly arise following the entry of multiple judgments of conviction in violation of the Double Jeopardy Clause. For example, *Ball* noted that the presence of two convictions on the record might, among other things, result in an increased sentence under some recidivist statute implicated at some later time, or be used to impeach the defendant's credibility in some later proceeding. *Id.* at 865. The Court also observed that the second judgment of conviction "carries the societal stigma accompanying any criminal conviction," an incremental punishment that is always present when a court enters multiple judgments of conviction. *Id.*

The Court in *Ball* did not, however, rely on the existence or magnitude of the second judgment's potential side effects in determining whether the Double Jeopardy Clause has been violated in the first instance. Indeed, the Court already had recognized in *Jeffers* that double jeopardy principles apply regardless of whether they have any measurable effect on the defendant's incarceration. There, the Court still held that cumulative punishment under 21 U.S.C. §§ 846 and 848 violates the Double Jeopardy Clause even though it noted that its holding was "of minor significance in this particular case," 432 U.S. at 157, because the Government could obtain the same prison sentence by charging the defendant with a violation of only Section 848.

*Ball* allows the Government to obtain multiple count indictments alleging separate offenses for which the legislature did not intend cumulative punishment, and to submit those cumulative counts to

the jury. However, *Ball* establishes a *per se* rule that prohibits the entry of judgment and imposition of sentence on both offenses.

*Per se* rules like the one in *Ball* are favored because they are predictable and easy to use, and therefore conserve precious judicial resources. This Court has formulated such bright-line rules specifically to protect the constitutional rights of criminal defendants. See, e.g., *Michigan v. Jackson*, 475 U.S. 625 (1986) (*per se* rule that after defendant requests assistance of counsel, any waiver of Sixth Amendment right to counsel is invalid); *Edwards v. Arizona*, 451 U.S. 477 (1981) (in furtherance of Fifth Amendment protections discussed in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), *per se* rule is that questioning of suspect must cease as soon as he or she asks for lawyer).

The merit of a bright-line rule "lies in the clarity of its command and the certainty of its application." *Mirnick v. Mississippi*, 498 U.S. 146, 151 (1990). Such a rule conserves judicial resources that would otherwise be expended in making difficult case-by-case determinations and implements existing constitutional protections in practical and straightforward terms. *Id.* In a variety of settings, this Court has avoided imposing case-by-case analysis requirements where the "clarity and ease of application" of an existing *per se* rule would be lost. See, e.g., *Davis v. United States*, 114 S. Ct. 2350, 2356 (1994) (refusing to create exception to "bright line" *Edwards* requirement that request for counsel be unambiguous before interrogation must cease).

The categorical rule in *Ball* serves the laudable goals of bright-line rules in general. It is unambiguous and easy to administer. Indeed, nine circuits already apply this rule to cumulative punishment under 21 U.S.C. §§ 846 and 848 with no difficulty. See p. 17, *infra*. The *Ball* rule prevents the violation of a defendant's rights under the Double Jeopardy Clause without interfering with the trial of the case in any way, because it only comes into play if and when a jury returns guilty verdicts upon two or more cumulative counts. Indeed, it may well serve to simplify trials by

diminishing the incentive "for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction" that came with "the advent of specificity in [legislative] draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses." *Ashe v. Swenson*, 397 U.S. 436, 446 (1970). Furthermore, the *Ball* rule avoids requiring a district court to rely on prophesy to predict whether any conceivable harm would ever result to a defendant before entering judgments of conviction under both Sections 846 and 848.

On the other hand, without the *Ball per se* rule, trial courts will have to attempt to predict the future before vindicating a criminal defendant's double jeopardy rights. This approach would thwart a fundamental constitutional protection without any corresponding benefit to the administration of justice. To the contrary, at best the case-specific inquiry into tangible consequences would hinder the administration of justice; more likely the inquiry would be unworkable. For example, given the economic limitations on our already overtaxed prison systems, the longer sentences being meted out, and the fact that elderly prisoners are the most costly to incarcerate and often the least likely to recidivate, legislatures may well resort to alternatives to incarceration, like home confinement or even early or compassionate release, for certain older prisoners.<sup>37</sup> In determining eligibility for such alternatives, an additional judgment of conviction and concurrent sentence that would appear to have no tangible effect at the trial might have a substantial impact twenty or thirty years later. Much more sensible than trying to predict the course of events over the span of a life sentence is the rule already established in *Ball* — that the entry of a cumulative judgment of

<sup>37</sup> See, e.g., Zimbardo, *Transforming California's Prisons Into Expensive Old Age Homes for Felons: Enormous Hidden Costs and Consequences for California's Taxpayers*, Report from the Center on Juvenile and Criminal Justice (Nov. 1994); Flynn, *The Graying of America's Prison Population*, 72 Prison J. 77 (1992); Turley, *Project for Older Prisoners (POPS)*, George Washington University National Law Center (1991).

conviction is itself a punishment forbidden by the Double Jeopardy Clause.<sup>6</sup>

There is little societal cost to using the *Ball per se* rule. By definition, in a case in which the imposition of the cumulative judgment and sentence on the defendant will have absolutely no tangible effect on punishment, the fact that the defendant is not adjudged guilty and sentenced for the cumulative offense will not shorten his or her sentence. In sharp contrast to *Miranda*, for example, which imposes substantial costs on society "by requiring the suppression of trustworthy and highly probative evidence," *Minnick*, 498 U.S. at 151, the *Ball* rule effectuates a fundamental constitutional right efficiently.

When the jury returned verdicts of guilty against Rutledge on both the CCE and the conspiracy counts, the district court entered judgment and imposed a sentence on each of those verdicts, including separate \$50 special assessments pursuant to 18 U.S.C. § 3013. As this Court's decisions in *Jeffers* and *Ball* demonstrate,

<sup>6</sup> Furthermore, the concept of "harmless error" is completely inapplicable here. Under a common formulation of this doctrine, "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (emphasis added), citing *Chapman v. California*, 386 U.S. 18, 24 (1967) ("harmless error" doctrine applies unless constitutional right violated is so basic to a fair trial that any infraction cannot be treated as "harmless error"); see also *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993) (on collateral review, error is harmless and habeas relief unwarranted if error did not have "substantial and injurious effect or influence in determining the jury's verdict") (emphasis supplied), citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). This doctrine is concerned exclusively with the fairness of the trial and whether the jury's verdict would have been different had the constitutional error not occurred. See *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring) (violations not related to the truth-seeking function of a trial are not subject to the "harmless error" doctrine). In contrast, the constitutional violation that Rutledge has suffered has no bearing on the jury verdict because the violation did not occur until after the verdicts were returned, when the court entered the judgments and sentences on the multiple convictions.

that violated the Double Jeopardy Clause. Avoiding that violation, though, could not have been more simple. Had the court merely entered judgment and imposed sentence on one of the two counts, the constitutional violation would not have occurred.

In fact, the straightforward application of *Ball* in the context of combined CCE and conspiracy prosecutions already is in effect throughout most of the nation. Nine courts of appeals have held that *Ball*, when considered in conjunction with *Jeffers* and *Garrett*, forbids the imposition of multiple judgments and concurrent sentences for both CCE and conspiracy violations in cases involving the same underlying conduct. See, e.g., *United States v. Rivera-Martinez*, 931 F.2d 148, 153 (1st Cir.), cert. denied, 502 U.S. 862 (1991); *United States v. Butler*, 885 F.2d 195, 202 (4th Cir. 1989); *United States v. Neal*, 27 F.3d 1035, 1054 (5th Cir. 1994), cert. denied, 115 S. Ct. 1165 (1995); *United States v. Paulino*, 935 F.2d 739, 751 (6th Cir. 1991), cert. denied, 502 U.S. 1036 (1992); *United States v. Possick*, 849 F.2d 332, 341 (8th Cir. 1988); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); *United States v. Stallings*, 810 F.2d 973, 976 (10th Cir. 1990); *United States v. Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); *United States v. Anderson*, 39 F.3d 331, 357 (D.C. Cir. 1994), reversed on other grounds, 59 F.3d 1323 (D.C. Cir. 1995) (*en banc*).<sup>7</sup> Even before this Court's opinion in *Ball*, a number of courts of appeals had ruled that the Double Jeopardy Clause bars both entry of judgment and imposition of concurrent

<sup>7</sup> On February 9, 1995, the District of Columbia Circuit granted a suggestion for rehearing *en banc* and vacated the panel opinion in *Anderson*. 39 F.3d at 361. The *en banc* rehearing addressed an unrelated question, holding that a defendant may not be convicted of multiple violations of 18 U.S.C. § 924(c)(1), which provides additional penalties for those who use firearms when committing drug trafficking offenses or crimes of violence, when the Government proves that the defendant used several firearms in connection with a single crime of violence or drug trafficking offense. See 59 F.3d 1323 (D.C. Cir. 1995) (*en banc*).

sentences on separate CCE and conspiracy counts. See, e.g., *United States v. Webster*, 639 F.2d 174, 182 (4th Cir. 1981), *modified in part on other grounds*, 669 F.2d 186 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982); *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979); *United States v. Dickey*, 736 F.2d 571, 597 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *United States v. Graziano*, 710 F.2d 691, 699 (11th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *United States v. Smith*, 703 F.2d 627, 628 (D.C. Cir. 1983). Indeed, the Seventh Circuit is the only court of appeals that allows the imposition of concurrent sentences notwithstanding the clear holdings of *Jeffers*, *Garrett*, and *Ball*.<sup>17</sup>

The Seventh Circuit has refused to draw the line at the jury's return of a guilty verdict, as *Ball* mandated. In *United States v. Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988), the court sought to distinguish *Ball* on the ground that *Ball* only prohibits convictions for violations of separate statutes which "create identical offenses." That distinction cannot be sustained, however, in light of *Ball*'s express focus on the question of legislative intent. Under *Ball*, once a court finds that Congress did not intend a defendant's conduct to be punishable under two separate statutes, "[o]ne of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." *Ball*, 470 U.S. at 864.

This Court's holding in *Jeffers* that Congress did not intend a defendant's single course of conduct to be punishable both as a conspiracy under Section 846 and as a CCE violation under Section

<sup>17</sup> The Second Circuit and the Third Circuit permit the entry of judgment on CCE and conspiracy counts, but neither of those courts permit the imposition of concurrent sentences. See *United States v. Aiello*, 771 F.2d 621, 634 (2d Cir. 1985) (permitting "combined" judgment of conviction on both CCE and conspiracy counts, and imposition of single sentence); *United States v. Fernandez*, 916 F.2d 125, 128-29 (3d Cir. 1990) (permitting separate CCE and conspiracy judgments, but imposition of only one sentence), *cert. denied*, 500 U.S. 948 (1991).

848 should end the double jeopardy inquiry. This conclusion as to Congress's intent automatically implicates the *Ball* prohibition against multiple convictions, not just multiple sentences, and "the only remedy consistent with the congressional intent is for the District Court . . . to vacate one of the underlying convictions." *Ball*, 470 U.S. at 864. The Court's emphasis in *Ball* on the impropriety of even a concurrent sentence under the Double Jeopardy Clause further demonstrates that when a criminal defendant's rights under the Double Jeopardy Clause are implicated, those rights must be protected regardless of the practical effect on the anticipated length of the defendant's incarceration or any other collateral consequences.

## CONCLUSION

For the foregoing reasons, Petitioner Tommy L. Rutledge respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand with a direction to vacate Rutledge's judgment of conviction and sentence under either Count 1 or Count 2 of the indictment.

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## APPENDIX

### RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

#### United States Constitution

##### Article I

No person shall be held in answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### United States Code, Title 18, Section 873

### APPENDIX

##### (a) Prohibited Acts

##### (1) Unlawful acts

Except as herein provided by the act chapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, transport, or dispose, or possess with intent to manufacture, transport, or dispose, a controlled substance;

(2) to create, distribute, or dispose, or possess with intent to distribute or dispose, a counterfeit substance;

The values set forth in the appendix represent an estimate of the particular categories of conduct which would be covered by the statute in the absence of any mitigating factors. The values are not intended to be used for the purpose of this report.

## APPENDIX

### RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

#### United States Constitution:

##### *Amend. V:*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### United States Code, Title 21:<sup>2</sup>

##### § 841. *Prohibited Acts A*

##### (a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

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<sup>2</sup> The statutes set forth in this Appendix reflect all amendments to date. The particular substance of amendments enacted after the time of the incidents set forth in the superseding indictment of Rutledge did not materially affect the statutes for purposes of this appeal.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title

after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, § 1005(a), Oct. 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4382; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047.)

#### § 846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265; amended Pub.L. 100-690, Title VI, § 6470(a), Nov. 18, 1988, 102 Stat. 4377.)

#### § 848. *Continuing criminal enterprise*

##### (a) Penalties: forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter.

##### (b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2) (A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million

dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section—

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years,

and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g)<sup>27</sup> Hearing required with respect to the death penalty

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by the Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice—

<sup>27</sup> The official statutory compilation skips subsection (f) of 21 U.S.C. § 48.

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if—

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant

shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of

mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability—

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether

the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

**(n) Aggravating factors for homicide**

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered,

unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

**(1) The defendant—**

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which—

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(o) Right of the defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her

individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall—

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report,

death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases: counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of Title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that—

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4) (A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had

not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and

expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

(Pub.L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265; Pub.L. 98-473, Title II, §§ 224(b), 305, Oct. 12, 1984, 98 Stat. 2030, 2050; Pub.L. 98-473, § 224(b), formerly § 224(c), as amended Pub.L. 99-570, Title I, § 1005(b)(2), Oct. 27, 1987, 100 Stat. 3207-6; Pub.L. 99-570, Title I, §§ 1252, 1253, Oct. 27, 1986, 100 Stat. 3207-14, 3207-15; Pub.L. 100-690, Titles VI, VII, §§ 6481, 7001, Nov. 18, 1988, 102 Stat. 4382, 4387, 4388; Pub.L. 103-322, Title XXXIII, §§ 330003(e), 330009(d), 330014, Sept. 13, 1994, 108 Stat. 2141, 2143, 2146.)